Supreme Court, U.S.
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NO.

IN THE

Supreme Court of The United States

RICHARD DARVIN BATES,
Petitioner,

-v-

STATE OF TEXAS,
Respondent.

On Petition For Writ of Certiorari
To The Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

THE LAW OFFICES OF
YOUNG & YOUNG, P.C.
SYDNEY SNELLING YOUNG
Counsel of Record
State Bar No. 00785009
101 West Houston Street
Paris, Texas 75460
(903) 785-2600
(903) 785-9500 (fax)
ATTORNEY FOR PETITIONER

26 pp

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE APPELLANT WAS IN CUSTODY WHEN HE WAS HELD BY A TITUS COUNTY TROOPER FOR A DETECTIVE WITH THE PARIS POLICE DEPARTMENT (LOCATED IN LAMAR COUNTY) BECAUSE HE FIT A DESCRIPTION OF A SUSPECT VEHICLE, SO THAT IT WAS ERRONEOUS TO ADMIT HIS STATEMENT AFTER THE DETECTIVE IGNORED HIS INVOCATION OF HIS RIGHT TO REMAIN SILENT? (RR 2:200-204, 216, 242).

2. WHEN A TROOPER DETAINED PETITIONER AS A SUSPECT AT THE SCENE FOR THE ARRIVAL OF A DETECTIVE FROM A CITY IN A CONGRUOUS COUNTY, SO THAT PETITIONER WAS FOR ALL PRACTICAL PURPOSES IN CUSTODIAL RESTRAINT, AND WITHIN THE SAME PERIOD OF TIME PETITIONER WAS FOLLOWED BACK TO PARIS, HIS SON WAS SEARCHED, AND, AT THE REQUEST OF THE POLICE, HE WENT TO THE POLICE STATION WHERE HE GAVE AN INTERVIEW, WAS THE INTERVIEW TAINTED BY THE ORIGINAL CUSTODIAL STOP, SO THAT THE PETITIONER HAD THE RIGHT TO TERMINATE THE INTERVIEW? (RR. 2:200-204, 214-221, 242).

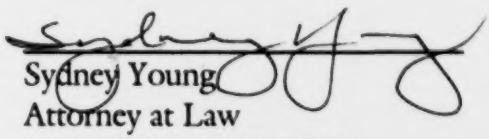
3. WAS PETITIONER IN CUSTODY WHEN HE ATTEMPTED TO STOP THE INTERROGATION, SO THAT THE COURT ERRED IN ADMITTING THE VIDEOTAPE OF THE INTERROGATION?

PARTIES TO THE PROCEEDINGS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. STATE OF TEXAS

2. RICHARD D. BATES



Sydney Young
Attorney at Law
State Bar No. 00785009

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OPINION BELOW AND CITATION

On June 28, 2000, the TEXAS COURT OF CRIMINAL APPEALS denied Bate's Application for Discretionary Review of the opinion affirming the conviction of petitioner for convictions of 6 years confinement in the Texas Department of Criminal Justice, Institutional. This opinion was written by the court of Appeals for the Sixth District of Texas, in Texarkana, on February 11, 2000. A copy of the opinion is attached as Appendix A. This opinion was published, at 15 S.W.3d 155 (Tex.–App. Texarkana, 2000, pet denied).

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code Section 1254(1). The petition is timely filed as the date of the order denying review was June 28, 2000. The notifications required by Rule 29.4(b)/(c) have been made.

PROVISIONS INVOLVED

U.S. CONSTITUTION, AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law.

U.S. CONSTITUTION, AMENDMENT VI

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the assistance of counsel for his defense."

U.S. CONSTITUTION, AMENDMENT XIV

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

On March 19, 1996, Petitioner, Richard Darvin Bates, was indicted of theft of property over $20,000.00 but less than $100,000.00. Petitioner pleaded not guilty and on July 14, 1998, the jury found Petitioner guilty of theft of property over $20,000.00 but less than $100,000.00. On the 14th day of July, 1998, Petitioner was sentenced to 6 years confinement in the Texas Department of Criminal Justice, Institutional Division, by the jury, and the judgment was entered on July 14, 1998.

While returning to Lamar County, Petitioner was detained by a Titus County Trooper who had heard Lamar County Detective Holmes' broadcast a description of a suspect's vehicle which matched that Petitioner was driving. (RR 2:201). Earlier that day, Holmes had received a call that Petitioner was at a scrap metal shop in Mount Pleasant, Texas. (RR. 2:200). Just two days before, Homes had received a complaint from Phillips Lighting that an undetermined amount of brass had been stolen from them, and that they suspected Petitioner, who was employed by them on the night shift. (RR. 2:200).

Accordingly, Holmes drove to Mount Pleasant and met up with the trooper and Petitioner on the highway 10 miles outside of town, which is over a half hour drive from Paris, Lamar County. (RR 2:200). Holmes told Petitioner he was investigating a theft and asked him to follow Holmes back to Paris

to discuss it. (RR 2:204). On the way, Petitioner stopped to let out his children, who were riding with him and Holmes searched the oldest child, a teenager who consented to the unfruitful search. (RR 2:209). Although the officer told Petitioner he was not under arrest when they arrived at the police station, he advised him of his *Miranda* rights. (RR. 2:211). Upon review of this question, the Court of Appeals detailed the pertinent part of their subsequent conversation captured on videotape, in which Petitioner invoked his right to silence and right to terminate the interview multiple times before the interview was ended. *(See App. 1 Court Opinion, pp. 5-7; see also*, State's Ex. 24) Despite this the trial court held that there was no custodial interrogation because Petitioner was not under arrest, and held that the jury was entitled to see the videotape in which Defendant denied wrong doing and tried to end the interview, casting him in a guilty light.(RR 2:19-21, States's Ex. 24).

The federal question raised in this application regarding the invocation of the right to silence in a custodial interrogation was first raised before trial and again before the admission of the video taped statement, by Defendant's attorney and it was denied by the trial court on the ground that there was no custodial interrogation. (RR 2:214-216, *See App. 2*). The State's brief in opposition, filed that same date, relies upon federal law for the determination of the question, urging the ruling ultimately given by the court. (T 83).

REASONS FOR GRANTING THE WRIT

A. A state court of last resort has decided an important question of federal law that has not been but should be settled by this Court or in a way that conflicts with a decision of this Court or another state court of last resort or of a United States court of appeals.

B. The Texas Court has entered a decision conflicting with the decisions of another United States Court of Appeals on an important matter or has so far departed from the accepted and usual course of judicial proceedings or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

ARGUMENTS AND AUTHORITIES

The questions here are raised by the detention by the Titus County Trooper and the effect this had on the issue of whether Petitioner was in custody, and if he was initially in custody, whether that custody was interrupted by the drive back to Paris and ultimate interview at the police station. Regarding these issues, the only facts considered by the Court of Appeals were basically that Petitioner was in a small room and he was told that he was not under arrest and free to leave. (*See App. 1* at pp.4-5). The court failed to analyze how the trooper's detention brought him into custody, whether subsequent actions by police can sufficiently interrupt that custody enough to remove any taint on the statement, how the custody issue is affected by *Miranda* warnings when considered with all the additional facts, (such as the trooper's stop, the search, and the probable cause for arrest).

This Court made the point in *Berkemer v. McCarty*, 468 U.S. 420, 440 (1984) that even traffic stops escalate into custody for practical purposes. Here, the *Miranda* warning and lack of adherence to it when invoked are important in that context. This Court has held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly was "seized" in the Fourth Amendment sense. *Dunaway v. New York*, 442 U.S. 200, 207 (1979). Similarly, in *U.S. v. Obasa*, the defendant's detention became an arrest when he was searched,

given *Miranda* warnings, and taken back to the police station. *Id.* 15 F.3d 603, 608 (6th Cir. 1994). Even the Fifth Circuit recognizes that an investigative stop ripens into an arrest if the police take an action such as removing the suspect from the scene of the stop to the police station. *United States v. Martinez*, 808 F.2d 1050, 1055 (5th Cir. [Tex.] 1987). This follows this Court's reasoning that:

> There is no doubt that at some point in the investigative process, police procedures can qualitatively and quantitatively be so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments. And our view continues to be that the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.

Hayes v. Florida, 470 U.S. 811, 815-16 (1985) (citations omitted); *See also United States v. Obasa,* 15 F.3d 603, 608 (6th Cir. 1994) (holding police officer knew that Miranda rights are required to be given only to individuals who are in custody, and "although giving Miranda warnings to a detainee may not automatically convert a Terry stop into an arrest, it is evidence that the nature of the detention has grown more serious").

Comparing these cases to the case at hand shows that review by the Supreme Court of the land is necessary. Texas

courts are becoming relaxed and lenient about the issue of custody and its relationship to interrogation. Under the case law cited above, it is easy to see that a reasonable person in Petitioner's shoes would have felt "seized" for all practical purposes. He was held by a deputy from another county until the detective from the concerned county arrived. When Petitioner was told by a figure of authority to go to the city police station, he was followed by the detective, and his child was searched when he stopped to let his children out of the car. Although he was later told that he was not under arrest, he was given a *Miranda* warning. When he attempted to invoke his rights, he was ignored. He did not leave the interrogation until he was allowed to by the detective.

Factual arrest occurs when questioning done under circumstances that cause a reasonable person to believe that the freedom to leave is dependent on answering the questions. *I.N.S. v. Delgado*, 466 U.S. 210, 216, (1984). This case is similar to an interesting case considered by the Sixth Circuit Court of Appeals in *Gardenhire v. Schubert*, 205 F.3d 303 (6th Cir. 2000). There the police contacted the suspects at their home and asked them to come to the scene of an alleged theft. *Id. at 308-309.* Once they arrived, the police explained what they were investigating and read them the *Miranda* rights. *Id.* at 309. They were denied the right to contact an attorney, and then they were requested to follow the police to the county's justice center, where they would be booked on charges of theft, burglary, and criminal tresspass. *Id.* The Court held that a reasonable jury could find that a reasonable person in the Gardenhires' position would not feel free to leave. *Id. at 314.*

Based upon this case law, Petitioner believes that there is ground for review here, as his state law case determined an issue that needs to be decided regarding the *Terry stop* and trip to the police station. In the event this Court believes this issue has been

addressed, review is also merited because of the opinion on review conflicts with the federal cases cited.

CONCLUSION

The Petitioner, RICHARD D. BATES, respectfully prays that a writ of certiorari issue to review the judgment of the Texas Court of Appeals for the 6th District, entered February 11, 2000, and the Texas Court of Criminal Appeals' refusal to review the opinion, such order of denial being entered on June 28, 2000.

DATED:
9/23/2000

Respectfully submitted,
THE LAW OFFICES OF
YOUNG & YOUNG, P.C.
101 West Houston Street
Paris, Texas 75460
(903) 785-2600
(903) 785-9500 (fax)

By: Sydney Snelling Young

Sydney Snelling Young
State Bar No. 00785009
ATTORNEY FOR PETITIONER

APPENDIX

1.
OPINION – Court of Appeals, 6th District of Texas
ORDER -- Texas Court of Criminal Appeals

2.
Statement of Facts Detailing Preservation of Error

- Appendix 1-
Opinion of the Court of Appeals, Sixth Appellate District of Texas at Texarkana

//seal//The State of Texas
In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-98-00248

RICHARD DARVIN BATES, Appellant
V.
THE STATE OF TEXAS, Appellee

On Appeal from the Sixth Judicial District Court
Lamar County, Texas
Trial Court No. 16068

Before Cornelius, CJ., Grant and Ross, JJ.
Opinion by Justice Grant

OPINION

After jury trial as to both guilt/innocence and punishment, Richard Darvin Bates was convicted of theft of property over $20,000 but less than $100,000 of value, a third degree felony. TEX. PEN. CODE ANN § 31.03(e)(5) (Vernon Supp. 2000). He received a sentence of six years' confinement in the Texas Department of Criminal Justice, Institutional Division. TEX. PEN. CODE ANN. § 12.34(a)(Vernon 1994).

On appeal, Bates raises four issues: 1) that the trial court erred in allowing the jury to view a videotape of Bates's oral statement to law enforcement authorities, because of the State's failure to comply with Article 38.22 of the Code of Criminal Procedure; 2) that he received unconstitutionally ineffective assistance of counsel because counsel failed to object to the State's abandonment of certain paragraphs in the indictment; 3) that the trial court erred in permitting the State to amend or abandon allegations in the indictment concerning a theft alleged to have occurred on August 1, 1995; and 4) that the trial court erred in permitting the State to make an actual, physical interlineation in the indictment after the trial commenced.

In his first point on appeal, Bates contends the trial court erred in admitting the jury's consideration the videotape of his interview at the Paris police station. He contends the State failed to comply with the requirements of *Miranda v. Arizona*[1] and TEX. CODE CRIM. PROC. ANN. art. 38.22 (Vernon 1979 & Supp. 2000), (a) in that the police failed to terminate the interrogation when Bates invoked his right to remain silent; and (b) in that the State failed to provide a copy of the videoed statement to defense counsel within the twenty-day limitation prescribed by Article 38.22, § 3(a)(5).

No statement of an accused as a result of a custodial interrogation shall beadmissible against the accused in a criminal

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[1]384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

proceeding unless, ***inter alia***, an electronic recording is made of the statement and, prior to the statement but during the recording, the accused is warned 1) that he has the right to remain silent and not make any statement at all and that any statement he makes may be used again him at trial; 2) that any statement he makes may be used as evidence against him in court; 3) that the accused has the right to have a lawyer present to advise him prior to and during any questioning; 4) that if the accused is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and 5) that he has the right to terminate the interview at any time. The accused must knowingly, intelligently, and voluntarily waive any rights set out in the warning. TEX. CODE CRIM. PROC. ANN. art. 38.22, §§ 2(a)(1)-(5)(b).

The determination of whether an individual is "in custody" for purposes of Article 38.22 must be made on an ***ad hoc*** basis after considering all of the objective circumstances. Police station questioning does not, in and of itself, constitute custody. *Dowthitt v. State*, 931 S.W.2d 244, 255 (Tex. Crim. App. 1996). There are four general situations that may constitute custody: 1) when the suspect is physically deprived of his freedom in any significant way; 2) when a law enforcement officer tells a suspect he cannot leave; 3) when law enforcement officers create a situation that would lead a reasonable person to believe that his freedom of movement has been significantly restricted; and 4) when there is probable cause for arrest and law enforcement officers do not tell the suspect that he is free to leave. *Id.* at 255. In situations one through three above, the restriction on freedom of movement must amount to the degree associated with an arrest, as opposed to an investigative detention. *Id.* at 255. The ultimate inquiry is whether there was a formal arrest or restraint on freedom associated with a formal arrest. *Stansbury v. California*, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994). In situation four, the officers' knowledge of probable cause to arrest must be

manifested to the suspect, i.e., custody is established if the manifestation of probable cause, combined with other circumstances, would lead a reasonable person to believe that he is under restraint to the degree associated with an arrest. *Dowthitt*, 931 S.w.2d at 255. The only relevant inquiry is how a reasonable person in the suspect's shoes would have understood the situation. *Stansbury*, 511 U.S. at 325.

Detective Holmes of the Paris Police Department was notified on January 3, 1996, of the theft of scrap brass[2] from the Phillips Lighting plant. Bates, who was employed by a Phillips contractor and who performed security work at the plant on weekends, was considered a suspect. On January 5, 1996, Detective Holmes received a call that Bates was at Allen Scrap Metal in Mount Pleasant selling scrap brass that was believed to have come from Phillips. Detective Holmes was proceeding south along Highway 271 toward Mount Pleasant when he encountered Bates. Bates was driving a pickup truck and pulling a trailer, and was accompanied by his nineteen-year-old stepson and five-year-old daughter. Bates had been pulled over by a Titus County sheriff's deputy for having no registration on the trailer and because he fit the description of the theft suspect broadcast on the police radio. After the Titus County deputy had the information he needed from Bates, Holmes approached Bates and spoke to him about his investigation of the theft from the Phillips's plant. At Holmes's request, Bates accompanied him back to the Paris police station. On the way, Bates stopped to drop off his stepson and daughter. An officer searched the stepson before he was allowed to leave. No search was performed on the daughter. Bates then went to the Paris police station, where Holmes and another

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[2]Light bulbs were manufactured at the Phillips Lighting plant. In the manufacturing process, part of the brass used therein becomes scrap. The scrap is collected in small bins on the manufacturing floor and transferred to a larger bin on the plant's premises.

officer interviewed him. The entire interview was recorded on videotape and was played before the jury.

The State contends that the videotaped interview was not the result of *custodial* interrogation and, therefore, the requirements of warnings and waivers were not triggered. Bates contends that situations one, three, and four of the *Dowthitt* factors are applicable to this case. After Bates had voluntarily followed the law enforcement officer to the station, Holmes read Bates his rights and discussed them with him. Mere recitation of *Miranda* warnings is more indicative of proper cautiousness than it is of an officer's intent to arrest. *Dancy v. State*, 728 S.W.2d 772 (Tex. Crim. App. 1987).

The interview included the following:

Bates: Okay, now that I don't understand. Talk to you about -- that's why I'm here, I don't know what we're talking about. That's where you say sign it before we talk about it. I don't know.
Detective: I mean I'll explain it to you.
Bates: Okay. No, I mean I understand --
Detective: You're not under arrest.
Bates: No, what I'm saying is I understand all of this and signing this means if you've done everything here.
Detective: Right.

. . . .

Detective: That I couldn't talk to you until I read you your rights, and I asked you if you would voluntarily come back to the station with me.
Bates: And I did.
Detective: And you agreed to it. Okay, so we don't have any problem with what we've done so far?
Bates: No.

. . . .

Bates: . . . I don't have anything more to say and the only thing I need to know is -- that's what I asked him. Where-do we go from here. Either -- if he wants me to come back in at a later time,

he can call me, I'll give you a phone number.
Detective: Where we go from here --.
Bates: I'm not running from here. I live here, and I've lived here for 14-15 years, and I've got no reason to leave. I've got no reason to go nowhere.
Detective: We don't think you're gonna go anywhere.
Bates: I know that.
Detective: But you're right. You do have the right to terminate. You can stop, you can say I'm through, I want to go home, whatever, because you're not under arrest today. Today is just the day that you're given a chance to tell the truth.
Bates: That's why I wanted to let you know too that if, you know, you don't have to put out a warrant. Call me, I'll come in.
. . . .
Bates: Like the (inaudible) today, like I said, he said to follow him back in. I followed him back in. I have no reason to run. I have no reason to think that I have a reason to run. You know, the law works with you or against you. If it's against you, it's because it was meant to be against you. If it's with you, it's because it was meant to be with you. And that's why I say, if he gets all the facts and everything you need, call me. I'll be willing to --.
Detective: He already has all the facts that he needs. He could take a warrant today if he wanted it.
Bates: I'm aware of that.

Whether a person voluntarily accompanies police officers, who are then only in the process of investigating a crime, to a certain location and a person knows or should know that the police officer suspects that person may have committed or been implicated in the crime, such person is not restrained of his freedom of movement and is not in custody. The accused is not in custody where he is accompanied by police officers to the police station or some other relevant place in furtherance of investigation of a crime, upon invitation, request, or even urging of the police, absent threats by the police, either express or implied. Custody

occurs when the suspect is actually arrested and can also occur when a suspect is physically deprived of his freedom of action in any significant way, such as being placed in the police vehicle and taken to the station for questioning, or when the suspect is led to believe, as a reasonable person, that he is deprived of freedom of movement, or when there is probable cause to arrest and the police do not tell the suspect that he is free to leave. *Shiflet v. State*, 732 S.W.2d 622 (Tex. Crim. App. 1985).

Although Bates was being questioned in a small room at the police station, there was no indication that he was ever physically deprived of his freedom in any significant way. Nowhere was there any testimony by Bates that the officer had told him that he could not leave, and the videotape shows that the law enforcement officer told him that he was not under arrest. Bates indicates by his statements that he knew that he was free to leave and was so informed by the police officer. After the interview, Bates did leave. We conclude that Bates was not in custody, and, therefore, the interrogation was not controlled by *Miranda* or Article 38.22.

Article 38.22, §§ 3(a)(5) pertains to the second part of this issue on appeal and provides that not later that the twentieth day before the date of the proceeding, the attorney representing the defendant is to be provided with a true, complete and accurate copy of all recordings the defendant made. However, this Rule applies only to custodial interrogations, and is not applicable to this noncustodial statement. The point of error complaining of the failure to provide a copy of the video not later than twenty days before the date of proceeding is overruled.

Points of error two, three, and four all concern the attempt by the State to amend or abandon certain paragraphs of the indictment. In point two, Bates asserts that his trial counsel was constitutionally ineffective for failing to object to a purported abandonment or amendment of the indictment to delete five paragraphs pertaining to alleged theft of aluminum. Ineffective

assistance of counsel is demonstrated by a showing of deficient performance by counsel and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Therefore, trial counsel's performance cannot be held to be ineffective unless it is shown that the trial court committed error in permitting the State to abandon these allegation, and such error was prejudiced.

Prior to the commencement of the voir dire and without objection from defense counsel, the State moved for leave to abandon paragraphs of the indictment which alleged that Bates stole aluminum on September 12, 1994, October 31, 1994, March 27, 1995, April 10, 1995, and July 5, 1995. Counsel for the State informed the trial court that the abandonment on these particular dates was as to theft of aluminum only, and that any allegations regarding theft of brass were still being charged.

An amendment is an alteration to the face of the charging instrument affecting its substance. *Eastep v. State*, 941 S.W.2d 130, 132 (Tex. Crim. App. 1997). In order to ensure the accused of his constitutional right to be informed of the nature of the charges against him,[3] there must be an actual, physical alteration of the charging instrument. *Id.* at 132; *Ward v. State*, 829 S.W.2d 787, 793 (Tex. Crim. App. 1992). An amendment to the charging instrument is subject to the limitations set forth in TEX. CODE CRIM. PROC. ANN. art. 28.10 (Vernon 1989). [4]

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[3]TEX. CONST. art. I, §§ 10; *Voelkel v. State*, 501 S.W.2d 313, 314-15 (Tex. Crim. App. 1973).

[4]Article 28.10 provides:

(a) After notice to the defendant, a matter of form or substance in an indictment or information may be amended at any time before the date the trial on the merits commences. On the request of the defendant, the court shall allow the defendant not less than 10 days, or a shorter period if requested by the defendant, to respond to the amended indictment or information.

An abandonment, on the other hand, although accomplished by physical alteration, does not affect the substance of the charging instrument. *Eastep*, 941 S.W.2d at 133. *Eastep* recognized three situations in which altering the charging instrument constitutes an abandonment, rather than an amendment: 1) abandonment of one or more of the alternative means by which an offense may be committed; 2) abandonment of an allegation if the effect is to reduce the prosecution to a lesser included offense; and 3) abandonment of surplusage. *Eastep*, 941 S.W.2d at 135. *Eastep* deals with a situation similar to that presented in this case:

> In the instant case, the indictment alleged theft of property with an aggregate value of $ 20,000 or more. The State altered the face of the indictment to delete nine appropriations. After the alteration there remained appropriations with an aggregate value of over $ 20,000. The deletion may be considered as either an abandonment of an alternative means of committing the offense or as the abandonment of surplusage. Under either circumstance, the alteration did not affect the substance of the charging instrument. The alteration was ***not*** an amendment.

Eastep, 941 S.W.2d at 135 (citations omitted).

Likewise, in the present case, certain allegations pertaining to the theft of aluminum were deleted from the charging

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(b) A matter of form or substance in an indictment or information may also be amended after the trial on the merits commences if the defendant does not object.

(c) An indictment or information may not be amended over the defendant's objection as to form or substance if the amended indictment or information charges the defendant with an additional or different offense or if the substantial rights of the defendant are prejudiced.

instrument. All allegations regarding theft of brass were retained in the indictment, and the amounts deleted from the indictment did not affect the minimum offense value of $ 20,000. The trial court did not err in allowing the State's requested abandonment, and defense counsel's objection thereto would have been unavailing. Therefore, we hold that trial counsel did not provide ineffective assistance in not objecting. *See Lucas v. Johnson*, 132 F.3d 1069, 1078 (5th Cir. 1998).

Point of error three alleges error by the trial court in permitting the State to abandon, over Bates's objection, an allegation in the indictment regarding a theft alleged to have occurred on August 1, 1995. That allegation referred to theft of brass by Richard Bates, but was actually a theft allegedly perpetrated by *Johnny Ray* Bates, a different person. On appeal, Richard Bates argues that this was actually an amendment of the indictment and, therefore, could not have been done over a defendant's objection under Article 28.10(b).

As previously discussed, an accused is constitutionally entitled to learn in advance of trial and with reasonable certainty with what he is being charged, so he can prepare a defense. This information must come from the face of the charging instrument. *Eastep*, 941 S.W.2d at 132. We have previously discussed the three types of alteration that would constitute an abandonment rather than an amendment to a charging instrument. *See Eastep*, 941 S.W.2d at 133-34.

The *Eastep* case cites, and Bates argues, that *Hilton v. State*, 879 S.W.2d 74 (Tex. App.-Houston [14th Dist.] 1994, pet. ref'd), is controlling. In the *Hilton* case, the State attempted to alter the indictment, which had previously charged the defendant with the theft of "two facsimile machines" to now charge him with theft of "one facsimile machine." The Fourteenth Court of Appeals ruled that this was an amendment subject to the restrictions of Article 28.10, and not, as argued by the State, simply an abandonment of one facsimile machine from the indictment. The

court said, "We note that the State not only deleted the words 'two facsimile machines,' but substituted the words 'one facsimile machine.' We find that the State's action in changing the words in the indictment was an 'amendment' within the meaning of Article 28.10." *Hilton*, 879 S.W.2d at 78-79. The other cases cited in *Eastep,* 941 S.W.2d at 132-33,[5] all involve a common characteristic, to-wit, the striking of one fact or allegation by the State and the substituting of another fact or allegation. We find that the State's dropping of the allegations of theft on August 1, 1995, was the abandonment of surplusage. There was no attempt to substitute *Richard* Bates for *Johnny Ray* Bates as the perpetrator of that alleged theft. That allegation was simply dropped. Where the indictment charges an individual with the appropriation of property in an aggregate amount pursuant to one scheme or continuing course of conduct, the State is not required to prove each individual appropriation. *Eastep,* 941 S.W.2d at 135.

We hold that this was properly an abandonment, not an amendment, and that the trial court did not err in permitting the State to abandon allegations during the course of the trial.

In Point of error four, Bates contends the trial court committed reversible error in permitting the physical interlineation of the abandoned allegations after the commencement of the trial. (The word *interlineation* means the act

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[5] *Sodipo v. State*, 815 S.W.2d 551, 555 (Tex. Crim. App. 1990) (opinion on reh'g) (alteration of a cause number in an enhancement paragraph); *Beebe v. State*, 811 S.W.2d 604, 606 (Tex. Crim. App. 1991) (addition of the manner and means of committing an offense); *Hillin v. State*, 808 S.W.2d 486, 487 (Tex. Crim. App. 1991) (alteration of a weapon in an aggravated assault); *Garcia v. State*, 928 S.W.2d 666, 667 (Tex. App.-Corpus Christi 1996, no pet.) (alteration of the alleged date); *McCoy v. State,* 889 S.W.2d 354, 358 (Tex. App.-Houston [14th Dist.] 1994, pet. ref'd); *Hinojosa v. State*, 875 S.W.2d 339, 341 (Tex. App.-Corpus Christi 1994, no pet.) (deleting "delivery" and replacing it with "possession").

of writing between the lines of an instrument, as well as what is written between the lines. BLACK'S LAW DICTIONARY, 819 (7th ed. 1999).) An examination of the abandoned allegations in the indictment shows that there was no interlineation on these allegations, but rather a striking through of the charges.

We have determined that the alterations to the charging instrument constitute abandonment, rather than amendment. Abandonment does not invoke the requirements of articles governing amendments of indictments or information. *Eastep*, 941 S.W.2d 130. Thus, the language about the amendment of an indictment contained in Article 28.10 of the Texas Code of Criminal Procedure is not applicable to this situation. When there is no evidence on a particular charge in the indictment, the allegation may be abandoned or the trial court may enter an instructed verdict on that charge anytime before the matter goes to the jury.

The State points out that the only legal consequence of an abandoned allegation is its double jeopardy implications. *Ex parte Scelles*, 511 S.W.2d 300, 301 (Tex. Crim. App. 1974). Point of error four is overruled.

The judgment is affirmed.

/s/ Ben Z. Grant
Justice
Date Submitted: February 10, 2000
Date Decided: February 11, 2000

June 28, 2000 OFFICIAL NOTICE FROM CCA, TX
COA#: 06-98-00248-CR PO BOX 12308, AUSTIN, TX
RE: Case No. 0701-00 POSTMARK//JUN28'00
STYLE: BATES, RICHARD DARVIN

On this day, the Appellant's Petition for Review has been REFUSED.

- Appendix 2-
Statement of Facts
Detailing Preservation of Error

[Page 214]

MS. HAMMOND: Your Honor, I do have several objections to the introduction of that video.

JUDGE LOVETT: Very Well. Ladies and gentlemen, I'm going to excuse you to go back to the jury room for just a few minutes while we take up these matters. I don't know what happened to our bailiff.

(Jury left the courtroom at 2:11 p.m.)

JUDGE LOVETT: The record should reflect that the jury is now out of the courtroom. Prior to the commencement of the trial, Miss Hammond advised that she would have some objections, and we reviewed the situation and the facts and the objections and the language at the time and made a preliminary ruling that I was going to permit the State to use that videotape based upon what I [Page 215] heard.

Miss Hammond, would you go ahead and dictate into the record the portion of the video that you think gives rise to a violation of your client's rights.

MISS HAMMOND: Yes, sir. I would. As Sergeant Holmes testified, Mr. Bates was taken into the interview room, and the video was on from the whole time he was in there. Sergeant Holmes did talk to him preliminarily for just a minute and went over his rights with him one at a time, very carefully.

After he finished reading his rights, Sergeant Homes said, "Now, you want to tell me about it?"

Mr. Bates replied, "I don't have anything to say about it besides that; I don't have anything to talk to you about on that."

Sergeant Homes replied, "You're not going to –"
And Mr. Bates interrupted and said, "I have nothing to discuss about it," and then Sergeant Holmes says, "You're going to deny selling that brass from Philips," and it goes on from there.
My position is that when Mr. Bates made those statements, he was invoking his right to remain [Page 216] silent, and he was requesting that the interview be terminated.
I understand from Sergeant Holmes' testimony that he had not been advised – that he had been told that he was not under arrest, and I will stipulate to that. That fact is true; however, he was told by a police officer, by a definite figure of authority, to follow me to the police department.
He was put into an interview room, which is just and empty room. He was left there with the door closed, and he was Mirandized. I would say that that would be akin to a custodial interrogation; otherwise, why would you bother Mirandizing someone and then say it doesn't apply?
* * *
[Page 218]
JUDGE LOVETT: And the problem is this is not a custodial interrogation, and as I understand Miss Hammond's position is that he was, in fact, under [Page 219] arrest and that this was a custodial interrogation.
Is that your position?
MS. HAMMOND: He had been advised that he was not under arrest, but I would say that he was in custody and that he was shut into a room, and he was Mirandized. I mean, a layman is not going to just get up and walk out of the police station from a closed room, so yes, that's my position.
* * *
[Page 221]
MS. HAMMOND: I renew my objection, Your Honor.
JUDGE LOVETT: The objections are overruled. State's Exhibit 24 will be admitted.